

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 CONCRETE NOR'WEST, A DIVISION OF
4 MILES SAND & GRAVEL

Case No. 07-2-0028

5
6 Petitioner,

ORDER ON DISPOSITIVE MOTION

7 v.

8 WHATCOM COUNTY,
9

10 Respondent.
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12
13 THIS Matter came before the Board on Whatcom County's motion to dismiss the Petition for
14 Review filed by Petitioner.¹

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16 **I. SUMMARY OF THE DECISION**

17 Having reviewed the motion, the Petition for Review, and the files and pleadings herein, the
18 Board denies the County's motion to dismiss which is based on the argument that the Board
19 lacks subject matter jurisdiction over any and all denials of comprehensive plan
20 amendments. Where there is a mandate to act, either in the Growth Management Act
21 (GMA) or in the comprehensive plan, the failure to act in accordance with express
22 requirements of either is subject to Board jurisdiction.
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24 However, in this case, Petitioner has failed to state grounds upon which Board action could
25 be predicated. In appealing the County's denial of an application to apply a Mineral
26 Resource Land designation to its property, Petitioner alleges violations of three GMA goals;
27 violation of GMA duties to "continually review and evaluate" mineral resource lands; and
28 violation of Whatcom County Comprehensive Plan policies which set forth general mineral
29 resource lands objectives of the comprehensive plan. None of these state sufficient bases
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¹ Respondent's Dispositive Motion, filed January 22, 2008.

1 for Board review of the denial of the comprehensive plan amendment sought here because
2 none of them mandate the specific action which was denied here. We note that a claim that
3 the County failed to follow the criteria and process for a designation change adopted in its
4 comprehensive plan *would* state a claim upon which the Board could act. However,
5 Petitioner did not allege that its property met the County's designation criteria for mineral
6 resource lands and that the County's plan required the designation change requested by
7 Petitioner. In the absence of this allegation, the petition asserts no basis for the Board to
8 decide whether the County's determination was in error. Accordingly, this appeal is
9 dismissed.
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11 **II. PROCEDURAL HISTORY**

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13 Petitioner Concrete Nor'west submitted an application to the County on December 20, 2006
14 for an amendment to the Whatcom County Comprehensive Plan and zoning map to create
15 a mineral resource land and zoning overlay designation for approximately 24.9 acres.² The
16 application was considered by County staff and the Planning Council, with the staff
17 recommending approval.³ On September 25, 2007, the Whatcom County Council adopted
18 its 2007 Comprehensive Plan amendments, but did not include the revisions requested by
19 Concrete Nor'west.⁴
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22 Concrete Nor'west filed a Petition for Review with the Board on November 16, 2007. The
23 Petition challenged the adoption of Whatcom County Ordinance 2007-048 and its failure to
24 change the comprehensive plan designation of Concrete Nor'west's 24.9 acre parcel from
25 Rural to Mineral Resource Land and its failure to change the zoning of that parcel from
26 Rural 5 to Rural 5 with a mineral resource land overlay. A prehearing conference was held
27 on December 18, 2007 and a Prehearing Order was issued on the same day. As stated in
28 the Prehearing Order, the issues in this appeal were:
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32 ² Petitioner's Memorandum in Opposition to Dispositive Motion, at 2.

³ Id.

⁴ Id.

1 1. Did the Whatcom County Council's decision to not adopt the Comprehensive Plan
2 Map Amendment and Zoning Map Amendment proposed by Petitioner, as set forth above,
3 violate the Growth Management Act, including but not limited to, the following Planning
Goals:

- 4 a. RCW 36.70A.020(5) Economic Development. Encourage economic development
5 throughout the state that is consistent with adopted comprehensive plans,
6 promote economic opportunities for all citizens of this state ...promote the
7 retention and expansion of existing businesses ...recognize regional differences
8 impacting economic development opportunities ...all within the capacities of the
9 state's natural resources, public service and public facilities.
10 b. RCW 36.70A.020(6) Property Rights. ...The property rights of landowners shall
11 be protected from arbitrary and discriminatory acts.
12 c. RCW 36.70A.020(8) Natural Resource Industries. Maintain and enhance natural
13 resource-based industries...

14 2. Did the Whatcom County Council's decision not to adopt the Comprehensive Plan
15 Map Amendment and Zoning Map Amendment proposed by Petitioner, as set forth above,
16 violate RCW 36.70A.130(1)(a), 36.70A.131, and 36.70A.170(c) of the Growth Management
17 Act which require the continual review and evaluation by the County of its current mineral
18 resource lands designations and specifically review and designation of mineral resource
19 lands of long-term significance?

20 3. Did the Whatcom County Council's decision not to adopt the Comprehensive Plan
21 Map Amendment and Zoning Map Amendment proposed by Petitioner, as set forth above,
22 violate Goals 8H, 8K, and 8P of the Whatcom County Comprehensive Plan, which states as
23 follows:

24 **Goal 8H:** Sustain and enhance Whatcom County's mineral resource industries,
25 support the conservation of productive mineral lands, and discourage incompatible
26 uses upon or adjacent to these lands.

27 **Goal 8K:** Achieve a balance between the conservation of productive mineral lands
28 and the quality of life expected by residents within and near the rural and urban
29 zones of Whatcom County.

30 **Goal 8P:** Designate Mineral Resource Lands (MRLs) containing commercially
31 significant deposits throughout the county in proximity to markets in order to avoid
32 construction aggregate shortages, higher transport costs, future land use conflicts
and environmental degradation. Balance MRL designations with other competing
land uses and resources.

33 4. Did the Whatcom County Council's decision not to adopt the Comprehensive Plan
Map Amendment and Zoning Map Amendment proposed by Petitioner, as set forth above,
violate Policy 8P-A of the Whatcom County Comprehensive Plan which states as follows:

Policy 8P-1 Designate a 50 year supply of commercially significant construction
aggregate supply.

1 On January 22, 2008 the County filed a motion to dismiss the Petition for Review. Concrete
2 Nor'West responded to the motion on February 5, 2008.

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4 A telephonic hearing on the motion was heard on February 13, 2008. Petitioner Concrete
5 Nor'west appeared through its attorney Lesa R. Starkenburg-Kroontje. Whatcom County
6 appeared through its attorney Karen Frakes. All three Board members attended, James
7 McNamara presiding.
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9 III. ISSUES ON APPEAL

10 On the motion, the issues for the Board are:

11 1. Does the Board have jurisdiction over the Petition for Review where the challenged action
12 is the decision of the County to deny an application to change the comprehensive plan and
13 zoning designation to adopt a mineral resource lands comprehensive plan and zoning
14 designation for approximately 24.9 acres of Petitioner's land?
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17 2. Assuming that the first question is answered in the affirmative, does the petition for
18 review state a claim upon which the Board may act where Petitioner has not alleged that its
19 property met the County's requirements for designation of a mineral resource land pursuant
20 to its adopted designation criteria?
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22 IV. DISCUSSION

23 Positions of the Parties

24 **County's Position**

25 The County begins by pointing out that it adopted its Comprehensive Plan in 1997. Its plan
26 included specific provisions regarding mineral resource lands and designation of mineral
27 lands of long-term commercial significance.⁵ Following a challenge to those provisions, the
28 Board found the mineral resource provisions complied with the GMA in *Wells v. Whatcom*
29 *County, WWGMHB No. 97-2-0030c (FDO, January 16, 1998).*
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⁵ Respondent's Memorandum in Support of Dispositive Motion, at 1.

1 Pursuant to RCW 36.70A.130, the County completed a review and update of its
2 Comprehensive Plan seven years later, including changes to the mineral resource
3 provisions. The County notes that the Board found that update compliant with the GMA in
4 *Franz v. Whatcom County, et al.*, WWGMHB No. 05-2-0011. Having conducted the review
5 of its 1997 plan, the County argues that it is currently under no obligation under the GMA to
6 review its plan until the next seven year review in 2011.⁶
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8 The County relates that, on December 30, 2005, Concrete Nor'west filed an application with
9 the County for an amendment to the County comprehensive plan and zoning map to create
10 a mineral resource land and zoning overlay designation for approximately 24.9 acres.⁷ The
11 matter was considered and denied by the County Council at a public hearing held on
12 January 30, 2007.⁸ The County argues that the Board does not have jurisdiction over
13 decisions to deny an application to amend a comprehensive plan or development
14 regulation. Instead, the County argues, unless a petition alleges that a comprehensive plan,
15 a development regulation or amendments to either violate the GMA, the Board does not
16 have subject matter jurisdiction to hear the petition.⁹ Further, the County argues, a review
17 based on a "failure to act" is authorized only where the jurisdiction fails to take an "action by
18 a deadline specified in the act", citing to WAC 242-02-220(5).¹⁰ Because the County did
19 not adopt any changes to its GMA compliant comprehensive plan or development
20 regulations, and did not fail to meet any deadline established by the GMA, the Board lacks
21 subject matter jurisdiction, the County argues.
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25 **Petitioner's Position**

26 Petitioner argues that both approvals and denials of comprehensive plan amendments are
27 subject to hearings board appeal.¹¹ It asserts that the annual review provisions of the
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30 ⁶ Id. at 2.

31 ⁷ Id. at 3.

32 ⁸ Id.

⁹ Id. at 4.

¹⁰ Id..

¹¹ Id. at 4.

1 Growth Management Act is a requirement that the County must engage in and over which
2 the Board has jurisdiction. The County's review and evaluation of proposed amendments
3 constitute an "action" reviewable by the Board, it claims.
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5 Petitioner further claims that the annual review process is also intended to provide the
6 opportunity to consider newly acquired information and thereby meet its requirement under
7 RCW 36.70A.171 to review its mineral resource land designations.
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9 Just as the County is required to address non-compliant provisions of its plan during an
10 update under RCW 36.70A.130(1) and (4), so too should it be required to address
11 noncompliance issues in its mineral designations when it elected to consider its proposal,
12 Petitioner suggests.¹²
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14 Petitioner also claims that when the County engages in the update process set forth in RCW
15 36.70A.130(2) and publicizes its annual comprehensive plan review, it opens itself up to
16 challenge if that review results in actions that are in violation of GMA mandates. In this
17 case, Petitioner asserts, those violations include the County's failure to designate its
18 property as mineral resource lands.
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21 Board Discussion

22 ***1. Does the Board have jurisdiction over the Petition for Review where the challenged***
23 ***action is the decision of the County to deny an application to change the***
24 ***comprehensive plan and zoning designation to adopt a mineral resource lands***
25 ***comprehensive plan and zoning designation for approximately 24.9 acres of***
26 ***Petitioner's land?***

27 At the outset, we reject the County's broad proposition that the Growth Management
28 Hearings Boards lack jurisdiction over any denial of an application for an amendment to a
29 local jurisdiction's comprehensive plan.
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¹² Id. at 9.
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1 Significantly, neither party cited in their briefs any Washington appellate court decisions or
2 prior decisions of the Western Board that addressed the issue of the Board's jurisdiction to
3 hear an appeal of a denial of a comprehensive plan amendment. Therefore, we look to the
4 language of the statute.

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6 The jurisdiction of the boards is established in RCW 36.70A.280 and 36.70A.290. RCW
7 36.70A.280(1)(a) provides:

8 (1) A growth management hearings board shall hear and determine only those
9 petitions alleging either:

10 (a) That a state agency, county, or city planning under this chapter is not in
11 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates
12 to the adoption of shoreline master programs or amendments thereto, or chapter
13 43.21C RCW as it relates to plans, development regulations, or amendments,
14 adopted under RCW 36.70A.040 or chapter 90.58 RCW;

15 The County stated at oral argument that it accepts and considers applications for mineral
16 resource land designation as part of the annual review of its comprehensive plan. It also
17 admitted that, in the event that it grants an application to designate a property with the
18 mineral resource land designation, that determination is subject to appeal to the Board.
19 However, it maintains that a denial of the same type of application is not subject to Board
20 appeal. It cites to the provisions of RCW 36.70A.280(1)(a) that give the Board jurisdiction
21 over compliance with the GMA "as it relates to plan, development regulations or
22 amendments"¹³ and RCW 36.70A.290(2) language regarding petitions "relating to whether
23 or not an adopted plan, development regulation, or permanent amendment thereto is in
24 compliance with the goals and requirements of this chapter".¹⁴ The distinction, the County
25 argues, is that applying the mineral resource land designation requires a plan amendment
26 and in this case, no such amendment was made. Thus, the County argues, because the
27 Board does not have subject matter jurisdiction in the absence of a plan amendment, this
28 appeal must be dismissed.
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¹³ Respondent's Memorandum in Support of Dispositive Motion, at 4.

¹⁴ Id.

1 We do not read RCW 36.70A.280(1) and 36.70A.290(2) so narrowly. The Washington
2 Supreme Court has held that the Board's jurisdiction is limited to comprehensive plans,
3 development regulations and amendments thereto.¹⁵ The subject of Petitioner's appeal is a
4 comprehensive plan amendment and therefore within the scope of the grant of jurisdiction to
5 the boards. Further, the courts hold that the question of compliance with the GMA is
6 uniquely a board question.¹⁶ If the boards do not have jurisdiction over a denial of a
7 comprehensive plan amendment, there is no remedy for the petitioner whose application for
8 a comprehensive plan amendment has been denied since there is no other avenue for
9 appeal.
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12 But a local jurisdiction can find itself "not in compliance with the requirements of this
13 chapter" even when it denies an application submitted during annual review. By way of
14 example, RCW 36.70A.140 imposes the following duty:
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16 Each county and city that is required or chooses to plan under RCW 36.70A.040 shall
17 establish and broadly disseminate to the public a public participation program identifying
18 procedures providing for early and continuous public participation in the development
19 and amendment of comprehensive land use plans and development regulations
20 implementing such plans. The procedures shall provide for broad dissemination of
21 proposals and alternatives, opportunity for written comments, public meetings after
22 effective notice, provision for open discussion, communication programs, information
23 services, and consideration of and response to public comments. . . . (emphasis
24 supplied)

25 Were a local jurisdiction to fail to comply with this duty of public participation in the
26 consideration of proposed amendments, it could hardly be asserted as a defense that,
27 because the proposals were ultimately not adopted, the Board had no jurisdiction to
28 consider a challenge to a lack of public participation. Instead, even in the face of a denial,
29 the Board would have jurisdiction to determine if the city or county was "in compliance with
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32 ¹⁵ Wenatchee Sportsmen v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (1999).

¹⁶ Woods v. Kittitas County, Slip Opinion 78331-4 (Dec. 20, 2007) at 19; Somers v. Snohomish County, 105 Wn.App. 937, 21 P.3d 1165 (2001, Div. I).

1 the requirements of this chapter” with regard to GMA public participation requirements in
2 reaching that determination.

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4 In our example, the critical question is not, therefore, whether the local jurisdiction denied a
5 request for a comprehensive plan amendment but whether the denial violated a requirement
6 imposed under the GMA.¹⁷ RCW 36.70A.140 imposes a requirement to adopt and follow a
7 public participation plan. In the absence of a remedy for failing to follow the public
8 participation plan, the adoption of one would be a meaningless act. Thus, the County’s
9 position that, in the absence of an amendment, the Board is without jurisdiction to review a
10 denial of a proposed amendment is incorrect.
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12 While the application of the County’s mineral resource land designation criteria is a different
13 type of issue from the just cited public participation example, there is an important similarity.
14 Just as a jurisdiction could not take shelter in a failure to engage in public participation
15 merely because the application under consideration was denied, neither can the County
16 shield itself from a review of how it applies its mineral resource designation criteria based on
17 its decision to deny a request to make a designation change. In the case of public
18 participation requirements, the process by which the local jurisdiction reaches its ultimate
19 conclusion is subject to review; in the present case, the process of considering the
20 application of the designation criteria would be an appropriate area of Board review. Were it
21 otherwise, it would not be possible for the Board to review those cases where the County’s
22 mineral resource land designation criteria were misapplied or misinterpreted so as to deny
23 designation in cases where the lands under consideration met the applicable criteria.
24 Furthermore, an aggrieved party seeking to challenge the County’s decision to deny a
25 proposed redesignation would have no recourse to the courts as the adoption and
26 amendment of comprehensive plans is a matter over which the Growth Management
27 Hearings Boards have jurisdiction.¹⁸
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32 ¹⁷ In this interpretation, this Board accords with *City of Tacoma v. Pierce County*, CPSGMHB Case No. 99-3-0023 (Order on Reconsideration, March 27, 2000).

¹⁸ RCW 36.70A.280.

1 The County characterizes the Petitioner's challenge as based on a "failure to act"¹⁹ and
2 points out that it adopted its mineral resource lands provisions, including the required
3 designation of mineral lands of long-term commercial significance in 1997.²⁰ It further
4 notes that, seven years later, it performed the review of its comprehensive plan and mineral
5 resource provisions, as required by RCW 36.70A.130.²¹ Consequently, it argues, it had no
6 obligation to revisit this portion of the comprehensive plan in 2006, when this application
7 was submitted, and that its mineral resource provisions are immune from challenge until
8 2011.²²

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11 However, merely because the County is currently under no obligation to review its mineral
12 resource lands provisions at the present time does not mean that the failure to follow its
13 adopted process and criteria for a designation change is subject to challenge only every
14 seven years.

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16 As part of its effort to conserve mineral resource lands, the County adopted a process within
17 its comprehensive plan for designation of mineral resource lands upon application of the
18 property owner or operator. The County's Mineral Resources section of its comprehensive
19 plan describes the difficulty of designating a sufficient supply of mineral resources and calls
20 for an expansion of mineral resource designations that meet certain criteria:

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22 The fifty year demand for minerals in Whatcom County is difficult to project and
23 requires many assumptions. Based upon Whatcom County's per capita rate of
24 consumption of 12.2 cubic yards of sand & gravel and 1.3 cubic yards of bedrock
25 that is being utilized for official planning purposes, approximately 174.4 million
26 cubic yards would be required over the fifty year planning period from 2005-2054.
27 The Washington State Department of Natural Resources, however, has
28 recommended a per capita rate that would result in a fifty year demand of
29 approximately 129 million cubic yards in Whatcom County. This estimate
30 assumes that conservation, recycling, increased cost, high density development
(which requires less rock per person), and political decisions will result in
reduced demand despite continued population growth. Conversely, some factors

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32 ¹⁹ See, WAC 242-02-220(5).

²⁰ Petitioner's Memorandum in Opposition to Dispositive Motion, at 1.

²¹ Id. at 2

²² Id.

1 may increase demand for aggregate such as the construction of mass
2 transportation systems, the possible substitution of masonry materials for wood
3 products, and increased exports to Canada or other United States counties.

4 Meeting the demand for construction aggregate in Whatcom County requires
5 expansion of the mineral resource land designations and the consideration of the
6 importation of aggregates. The policies and criteria below are meant to guide
7 meeting the demand for construction aggregate.²³

8 The comprehensive plan then goes on to specify 17 designation criteria.²⁴ Using those
9 designation criteria, the plan establishes a process for making additional designations. One
10 of those methods is upon the application of the owner or operator of a mineral resource
11 operation:

12 **MINERAL RESOURCES - SITE SELECTION METHOD**

- 13 1. Sites meeting Mineral Resources Designation Criteria 1-5 (and areas
14 enclosed by these sites greater than 50%).
15 2. Sites requested by owner or operator meeting designation criteria.
16 3. Sites that are regionally significant meeting designation criteria.
17 4. Sites adjacent to both roads and other proposed MRL sites meeting
18 designation criteria²⁵

19 Having chosen to adopt a process for considering applications for the designation of
20 additional mineral resource lands as part of its GMA requirement to conserve natural
21 resource lands, the County cannot then avoid review of the decisions it makes upon those
22 applications during annual review.

23 While we do not accept the County's position that the boards lack jurisdiction over denials of
24 proposed plan amendments, neither do we accept Petitioner's argument that a local
25 jurisdiction necessarily opens unamended portions of its plan to appeal when it conducts its
26 annual review. Petitioner misreads the statutory scheme of plan updates set forth in RCW
27 36.70A.130. Contrary to its assertion that "The annual procedure to either legislatively
28 amend, or chose not to amend, a comprehensive plan is a requirement for Whatcom County
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32 ²³ Whatcom County Comprehensive Plan at 8-26 – 8-27.

²⁴ *Ibid* at 8-29 – 8-30.

²⁵ Whatcom County Comprehensive Plan, at 8-30.

1 under the GMA"²⁶ the GMA instead provides that local jurisdictions may consider updates,
2 proposed amendments or revisions may be considered "no more frequently than once every
3 year".²⁷ Pursuant to RCW 36.70A.130(4)(a) the County shall review, and if necessary
4 revise, its comprehensive plan every seven years. It is this seven year update cycle to
5 which RCW 36.70A.131 refers when it mandates that the County shall review its mineral
6 resource lands designations and development regulations as part of the review required by
7 RCW 36.70A.130(1).
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10 **Conclusion:** The subject of Petitioner's appeal is a comprehensive plan amendment and
11 therefore within the scope of the grant of jurisdiction to the boards. The County's process for
12 considering applications for the designation of additional mineral resource lands as part of
13 its GMA requirement to conserve natural resource lands is subject to Board review even
14 when that review concludes in denial of an application.
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16 ***2. Assuming that the first question is answered in the affirmative, does the petition***
17 ***for review state a claim upon which the Board may act where Petitioner has not***
18 ***alleged that its property met the County's requirements for designation of a mineral***
19 ***resource land pursuant to its adopted designation criteria?***

20 Having concluded that the mere fact of the denial of the Petitioner's application does not
21 divest the Board of jurisdiction, this does not necessarily lead to the conclusion that the
22 Board can hear this appeal. Instead, we must examine the issues presented in the Petition
23 for Review to determine if they present claims that the Board can address in this appeal.
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25 In this case, Petitioner has not alleged a violation of a GMA requirement with regard to the
26 very aspect of the County's process that we have concluded is subject to review – the
27 application of the mineral resource designation criteria.
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²⁶ Respondent's Memorandum in Support of Dispositive Motion, at 6.

²⁷ RCW 36.70A.130(2)(a).

1 Once the plan has been found compliant or is presumed compliant after the period for
2 appeal has expired, the goals and procedures adopted in the plan are presumed to comply
3 with the GMA. When a local jurisdiction acts in conformity with its compliant comprehensive
4 plan, there is no basis for a challenge to those actions as failing to comply with GMA goals
5 and requirements. Once a comprehensive plan is adopted and is either found or deemed
6 compliant with the GMA, challenges may not be brought to compliance with GMA goals but
7 must be brought under the policies and objectives adopted by the comprehensive plan to
8 meet GMA requirements. Therefore, Petitioner's challenges in Issue 1, i.e. failure to comply
9 with goals 5, 6 and 8 of the GMA²⁸, are not timely.
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12 As we have already addressed above, the challenges in Issue 2 (to the sufficiency of the
13 annual review) are not well-founded. The compliance of the County's plan policies and
14 development regulations are not opened for review annually unless the County adopts a
15 change to them. The seven-year update pursuant to RCW 36.70A.130 is the opportunity for
16 the County and its citizens to raise amendments to bring the plan and development
17 regulations into compliance where necessary.
18

19 Although it is possible to raise a claim for violation of the County's own plan requirements,
20 the petition for review did not do that. The violation of the County's comprehensive plan
21 goals asserted in Issues 3 and 4 do not raise claims under express requirements of the plan
22 with respect to the property at issue here. Goals 8H, 8K, 8P and 8P-1 state general
23 objectives of the County's mineral resource lands strategy; they do not require any particular
24 action with respect to the Petitioner's application. While the plan does contain requirements
25 for the consideration of additional mineral resource lands designations upon application of
26 the property owner, those plan requirements are not challenged in the petition for review.
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²⁸ RCW 36.70A.020(5), (6) and (8).

1 A Growth Management Hearings Board may decide only issues “presented to the board in
2 the statement of issues, as modified by any prehearing order”.²⁹ The issues in this case, as
3 stated in the Prehearing Order allege that that County’s decision to not make a designation
4 change to Petitioner’s property violated GMA goals five, six and eight (issue 1); that the
5 County violated its obligations under RCW 36.70A.130(1)(a), .131 and .170(c) (issue 2); that
6 the County violated its own comprehensive plan goals (issue 3); and that the County
7 violated a comprehensive plan policy (issue 4). Conspicuously absent is an allegation that
8 the County misapplied its mineral resource land designation criteria, and that Petitioner’s
9 property qualified for designation under those criteria. In the absence of such an allegation,
10 under RCW 36.70A.290(1), the Board lacks a basis upon which to consider whether the
11 County applied those criteria correctly. Since the petition for review fails to state a claim of
12 a failure to follow a plan requirement in the County’s determination with regard to the
13 mineral resource lands designation criteria, this appeal must be dismissed.
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16 **Conclusion:** Petitioner has not alleged a violation of a GMA requirement with regard to the
17 very aspect of the County’s process that we have concluded is subject to review – the
18 application of the mineral resource designation criteria. In addition, Petitioner’s challenges in
19 Issue 1 are not timely. Once a comprehensive plan is adopted and is either found or deemed
20 compliant with the GMA, challenges may not be brought to compliance with GMA goals but
21 must be brought under the policies and objectives adopted by the comprehensive plan to
22 meet GMA requirements. The challenges in Issue 2 are not well-founded. The compliance
23 of the County’s plan policies and development regulations are not opened for review
24 annually unless the County adopts a change to them, which is not the case here. The
25 violation of the County’s comprehensive plan goals asserted in Issues 3 and 4 do not raise
26 claims under express requirements of the plan with respect to the property at issue here.
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²⁹ RCW 36.70A.290(1).
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V. FINDINGS OF FACT

1. Whatcom County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.76A.040.
2. On December 20, 2006 Petitioner submitted an application for an amendment to the Whatcom County Comprehensive Plan and zoning map to create a mineral resource land and zoning overlay designation for approximately 24.9 acres. The application was considered by County staff and the Planning Council.
3. On September 25, 2007, the Whatcom County Council adopted its 2007 comprehensive plan amendments. These amendments did not include the amendment requested by Petitioner.
4. On November 16, 2007 Petitioner filed a timely Petition for Review.
5. The Petition for Review in this case did not allege that the County improperly applied its mineral resource lands designation criteria, nor that Petitioner's property met those criteria.
6. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

VI. CONCLUSIONS OF LAW

- A. The Board has jurisdiction over the parties to this action.
- B. Petitioner Concrete Nor'West has standing to raise the issues in this case.
- C. The jurisdiction of the Board includes the authority under RCW 36.70A.280(1) to determine whether a state agency, county, or city planning under RCW 36.70A is not in compliance with the requirements of this chapter.
- D. The subject of Petitioner's appeal is a comprehensive plan amendment and therefore within the scope of the grant of jurisdiction to the boards.
- E. The County's process for considering applications for the designation of additional mineral resource lands as part of its GMA requirement to conserve natural resource lands is subject to board review pursuant to RCW 36.70A. 280(1).

- 1 F. The Board can find a county or city “not in compliance with the requirements of this
2 chapter” within the meaning of RCW 36.70A.280(1) even where county or city
3 denies an application submitted during annual review.
- 4 G. A Growth Management Hearings Board may decide only issues presented to the
5 board in the statement of issues, as modified by any prehearing order pursuant to
6 RCW 36.70A. 290(1).
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8 H. Absent an allegation in the Petition for Review that the County misapplied its mineral
9 resource land designation criteria, and that Petitioner’s property qualified for
10 designation under those criteria the Petitioner has failed to allege violations sufficient
11 to allow the Board to consider whether the County applied those criteria correctly
12 pursuant to RCW 36.70A.290(1).
- 13
14 I. Once a comprehensive plan is adopted and is either found or deemed compliant with
15 the GMA, challenges may not be brought to compliance with GMA goals but must be
16 brought under the policies and objectives adopted by the comprehensive plan to
17 meet GMA requirements.
- 18
19 J. The challenges in Issue 2 are not well-founded. The compliance of the County’s plan
20 policies and development regulations are not opened for review annually unless the
21 County adopts a change to them, which is not the case here pursuant to RCW
22 36.70A.130(1) and (4).
- 23
24 K. The violation of the County’s comprehensive plan goals asserted in Issues 3 and 4
25 do not raise claims under express requirements of the plan with respect to the
26 property at issue here, and therefore will not be considered by the Board pursuant to
27 RCW 36.70A.290(1).
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29 L. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.
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1 **VII. ORDER**

2 Based upon a review of the Petition for Review, the briefs and exhibits submitted by the
3 parties, and having considered oral argument, and deliberated, the County's motion to
4 dismiss the Petition for Review is GRANTED.

5
6 SO ORDERED this 28th day of February, 2008.

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10 _____
James McNamara, Board Member

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12 _____
Holly Gadbow, Board Member

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14 _____
Margery Hite, Board Member

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16
17
18 Pursuant to RCW 36.70A.300 this is a final order of the Board.

19
20 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
21 mailing of this Order to file a petition for reconsideration. Petitions for
22 reconsideration shall follow the format set out in WAC 242-02-832. The original and
23 three copies of the petition for reconsideration, together with any argument in
24 support thereof, should be filed by mailing, faxing or delivering the document directly
25 to the Board, with a copy to all other parties of record and their representatives.
26 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

27
28 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
29 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
30 judicial review may be instituted by filing a petition in superior court according to the
31 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
32 Enforcement. The petition for judicial review of this Order shall be filed with the
appropriate court and served on the Board, the Office of the Attorney General, and all
parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person, by fax or by mail,

1 but service on the Board means actual receipt of the document at the Board office
2 within thirty days after service of the final order.

3 Service. This Order was served on you the day it was deposited in the United States
4 mail. RCW 34.05.010(1)

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